UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ALAN F. CAMPBELL,

Plaintiff,

MEMORANDUM AND ORDER
CV-02-3084

-against-

LIBERTY TRANSFER CO.

Defendant.
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A P P E A R A N C E S:

For Plaintiff:
William Coudert Rand, Esq.
711 Third Avenue, Suite 1505
New York, New York 10017

For Defendant:
Mintz & Fraade, P.C.
488 Madison Avenue - Suite 1100
New York, New York 10022
By: Alan P. Fraade, Esq.
Edward C. Kramer, Esq.

HURLEY, District Judge

On June 18, 2004, the jury returned a verdict for $106,150.00 in favor of plaintiff Allen F. Campbell ("plaintiff" or "Campbell") against defendant Liberty Transfer Co. ("defendant" or "Liberty") on each of plaintiff's three causes of action, those being a claim under Uniform Commercial Code § 8-401, a claim for conversion, and one based on negligence.

The purpose of this decision is to address outstanding motions made by defendant and plaintiff. Defendant identifies its motions as one "for summary judgment [as of] the conclusion of Plaintiff's case" and the other as a "post-trial

motion to set aside the jury's verdict." (Def.'s Mem. Supp. at 1.) These motions are deemed to be made pursuant to Fed. R. Civ. P. 50(b) and will be treated as one post-verdict motion seeking judgment as a matter of law on a number of different grounds.

Plaintiff, in his motion, requests (1) that judgment be entered not only against defendant but also against non-party Sara Sander ("Sander"), the purported sole owner of Liberty, and (2) that prejudgment interest at the rate of 9% be included within the judgment.

Defendant's motion will be addressed initially, followed by plaintiff's.

DISCUSSION

Part I – Defendant's Motion

Plaintiff has advanced various arguments in opposing defendant's motion. But his threshold argument, viz. that it is untimely, is both correct and dispositive. As a result, the parties' arguments unrelated to the timeliness issue will not be addressed.

1. Rule 50

Rule 50 provides in relevant part:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue

> against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.
>
> (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59.[1]

Fed. R. Civ. P. 50(a) and 50(b)(emphasis added to last sentence of text).

A post-verdict motion for judgment as a matter of law is governed by Rule 50(b), as is the renewal of an undecided motion for the same relief made at the conclusion of plaintiff's case-in-chief. As explained infra, a district court is powerless to entertain a Rule 50(b) motion on the merits unless (a) the

[1] Defendant's motion seeks judgment as a matter of law; no alternate request for a new trial has been made.

movant requested judgment as a matter of law when plaintiff rested his direct case and again when all the evidence was before the jury, and (b) the motion is made within 10 days of entry of judgment.

2. Defendant's Rule 50(a) Motions Made During the Course of the Trial

At the conclusion of plaintiff's case-in-chief, defendant moved for judgment as a matter of law on numerous grounds which largely parallel those advanced in its current motion. (Trial Transcript ("Tr.") at 118-129; 139-140.) The Court reserved decision on that motion.

The defense did not expressly move for judgment as a matter of law at the conclusion of all the evidence. In plaintiff's view, that failure constitutes a "waive[r]" of defendant's right to invoke Rule 50 in endeavoring "to set aside the verdict . . . and vacate the judgment." (Pl.'s Mem. Opp'n at 5-6.) While the making of such a motion is necessary to preserve the issue for post-verdict consideration (9A Wright and Miller, Federal Practice and Procedure: Civil 2d § 2537 at 335-36), defendant, during the charge conference, reiterated a number of the arguments earlier voiced concerning the claimed insufficiency of plaintiff's proof and defendant's right to judgment as a matter of law. Accordingly, the Court will treat that charge conference colloquy as a motion for judgment as a matter of law

made at the conclusion of all of the evidence. See, e.g., Greenwood v. Societe Francaise De, 111 F.3d 1239, 1244-45 (5th Cir. 1997); Scottish Heritage Trust, PLC v. Peat Marwick Main & Co., 81 F.3d 606, 610-11 (5th Cir. 1996); Pro Football Weekly, Inc. v. Gannett Co., Inc., 988 F.2d 723, 725-26 (7th Cir. 1993); see generally, 9A Wright & Miller, Federal Practice and Procedure: Civil 2d § 2537 at 336-39 ("Because [the need to make a Rule 50(a) motion at the conclusion of all the evidence] is a potential trap for the unwary, the federal courts fortunately take a liberal view of what constitutes a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient prerequisite for the later motion.").

Although defendant made the required Rule 50(a) trial motions, it neglected to renew those motions within 10 days of the entry of judgment as required by Rule 50(b).

3. Defendant's Rule 50(b) Motion is Untimely

After the jury returned its verdict on June 18, 2004, no oral or written Rule 50(b) motion was made by defendant. (Tr. at 274.) Later that same day, judgment was entered in keeping with this Court's standard practice and the requirements of Fed. R. Civ. P. 58(a)(2)(i).[2]

[2] Fed. R. Civ. P. 58(a)(2)(i) provides that "unless the court orders otherwise, the clerk must, without waiting the

Several weeks thereafter, a briefing schedule was established for any post trial motions even though the defendant had not yet moved for judgment as a matter of law pursuant to Rule 50(b). That schedule was later extended by Memorandum and Order dated August 12, 2004. Consistent with the revised briefing schedule, defendant's Rule 50(b) motion was not filed until mid-November 2004. Clearly, the 10 day period had long since run its course by then unless, as defendant contends, the judgment should not have been filed in the first place. Before discussing defendant's arguments as to why that is supposedly so, attention will be focused on the legal effect of an untimely Rule 50(b) motion.

4. Rule 50(b)'s 10 Day Time Limitation is Jurisdictional and May Not be Modified by the Court

It is well established that the time limitation set forth in Rule 50(b) is jurisdictional. See Rodick v. City of Schenectady, 1 F.3d 1341, 1346 (2d Cir. 1993)("Fed. R. Civ. P. 50(b) . . . requires that a motion for judgment as a matter of law be made 'not later than 10 days after entry of judgment.' Fed. R. Civ. P. 6(b) makes [the] 10 day time limitations jurisdictional so that the failure to make a timely motion divests the district court of power to modify the trial

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court's direction, promptly prepare, sign, and enter judgment when . . . the jury returns a general verdict."

verdict."); Fruit of the Loom Inc. v. American Mktg. Enters., No. 97 Civ. 3510, 1999 WL 527989, *1 (S.D.N.Y. July 22, 1999); see generally, 9A Wright and Miller, Federal Practice and Procedure: Civil 2d, Section 2537 at 350-52 ("[T]he time period prescribed by the rule cannot be enlarged, either by the court or by stipulation of the parties, and an untimely motion cannot be considered by the district judge.").

5. Defendant's Position

Plaintiff raised the Rule 50(b) jurisdictional issue as Point I in his Memorandum in Opposition to the relief currently sought by defendant. But absent from defendant's Reply Brief, or elsewhere in its motion papers, is any mention of this pivotal subject.

However, reference to defendant's papers submitted in opposition to the plaintiff's post-verdict motion partially fills the void. Therein, defendant succinctly speaks of plaintiff's request as being "premature" given "issues . . . not yet . . . fully adjudicated." (Def.'s Mem. Opp'n at 1-2.) That same argument, in considerably more expansive form, is found in a letter dated July 8, 2004, which defendant sent to Court shortly after Rule 50(b)'s 10 day period had expired.

In that letter, defendant objected to the entry of judgment based on "several issues left unresolved." Those issues were identified thusly:

> The first issue was our motion for judgment at the conclusion of Plaintiff's case, on which the Court reserved decision. The next issues were the multitude of legal and factual issues with respect to Rule 144, to which all parties agreed, stipulated and consented would not go to the jury, but would remain with the Court to decide in the event of a Plaintiff's verdict. These issues generally deal with whether or not the Plaintiff could have legally sold shares under Rule 144, and complied with such legal requirements, at the time he alleges damages accrued, and whether or not the Defendant could have issued free trading shares under Rule 144 without undue exposure to violations of the Securities Laws.
>
> There are also the post trial issues regarding the verdict itself and whether or not it was contrary to the weight of the evidence. As well, there was the issue of whether or not Plaintiff set forth a prima facie case on damages, considering there was no expert testimony and no evidence of sufficient volume to sell the shares at the price claimed during the time Plaintiff claims he would have sold the shares, as well as the effect on price of dumping shares in a thinly traded securities market.

(July 8, 2004 Letter from Edward J. Kramer, Esq. to Court at 1-2.)[3]

The Court assumes — based on defendant's response to

[3] Defendant's July 8, 2004 letter concludes with an untimely request that the judgment be vacated. Over the objection of plaintiff and in then unknowing contravention of established law, see Johnson v. New York, New Haven and Hartford R.R. Co., 344 U.S. 48, 50-54 (1952) (discussed infra), the Court, by Memorandum and Order dated August 12, 2004, directed the Clerk of Court to vacate the June 18th judgment on the basis that defendant's motion made at the end of plaintiff's case-in-chief remained unresolved.

plaintiff's motion and the July 8th letter – that it is defendant's position that the time to file a Rule 50(b) motion never started to run, or was somehow tolled, because (1) the Court reserved decision on the Rule 50(a) motion made at the conclusion of plaintiff's case-in-chief, and (2) there were other "unresolved" issues as detailed in defendant's letter. Accordingly, each of the arguments detailed in the July 8th letter will be discussed seriatim.

6. Significance of Court Reserving Decision on Defendant's Rule 50(a) Motion at Conclusion of Plaintiff's Case-in-Chief

Judgment was entered as a matter of course following receipt of the jury's verdict. Defendant was required to renew the motion made at the conclusion of plaintiff's case-in-chief within the prescribed period for the motion to remain viable. Its failure to do so renders this Court unable to entertain the current Rule 50(b) motion on the merits. See, e.g., Johnson, 344 U.S. at 50-54; see also 9A Wright & Miller, Federal Practice and Procedure: Civil 2d § 2537 at 355 ("Judgment cannot be had as a matter of law, either after verdict or after a jury disagreement, in the absence of a motion for judgment. The motion must be made even though the trial court expressly has reserved decision on the motion at the close of the evidence. This is the teaching of the much criticized case of Johnson v. New York, New Haven &

Hartford Railroad Company, [344 U.S. 48 (1952)]").[4]

7. Legal and Factual Issues Purportedly to be Decided by Court

The next issue identified by defendant in its July 8, 2004 letter as warranting a vacatur of the June 18, 2004 judgment – and presumably intended to be advanced in seeking to overcome plaintiff's Rule 50(b) jurisdictional argument – relates to the "multitude of legal and factual issues with respect to Rule 144[5] to which all parties agreed, stipulated and consented would not go to the jury but would remain with the Court to decide in the event of a Plaintiff's verdict." (July 8, 2004 Letter from Edward J. Kramer, Esq. to Court, at 1.) The claimed "agreement of the parties and the Court [was supposedly reached] prior to the commencement of the trial." (Def.'s Post Trial Br. at 1.)

With respect to defendant's understanding, plaintiff responds that there "does not appear to be any evidence of such an agreement in the record and Plaintiff's counsel does not

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[4] Parenthetically, neither the Court's issuance of a briefing schedule for post trial motions on July 2, 2004, nor its August 12, 2004 Order vacating the June 18, 2004 judgment based on defendant's belated application for such relief, alters Rule 50(b)'s time frame. See, e.g., Weissman, 214 F.3d at 230 (2d Cir. 2000)("[E]ven if the district court extended the time in which the movant could make the motion, any reliance on that extension 'is flawed . . . because it fails to recognize that the Rule 50(b) and 59 time limitations are jurisdictional and that excuses are therefore unavailing.'" (quoting Rodick v. City of Schenectady, 1 F.3d 1341, 1347 (2d Cir. 1993)).

[5] Rule 144 is found at 17 C.F.R. § 230.144.

recall any such agreement." (Pl.'s Mem. Opp'n at 6.) My recollection, confirmed by a perusal of the record, dovetails with that of plaintiff's counsel.

In response to plaintiff's disavowal of the claimed pretrial agreement, defendant simply once again refers to "the Rule 144 issues reserved to the Court" absent a supporting reference to the trial transcript or other writing, or the date, location and other attendant circumstances giving rise to the stipulation if it is claimed to be outside the record. (Def.'s Reply at 1.) Under the circumstances, the Court concludes that defense counsel's recollection is faulty and no such pretrial agreement was ever reached.

There was, however, a charge conference agreement relating to Rule 144, and defendant is thus off-target on the timing of the agreement as distinct from its existence.

By way of background, the jury had been presented with considerable evidence (primarily from Campbell and Liberty's manager, Conger), plus argument (from both attorneys) about Rule 144. Questions arose during the charge conference about the level of detail that should be included in the Court's instruction and what issues, if any, were for the Court to decide as issues of law. (See Tr. at pp. 176-201.)

Ultimately it was agreed that the Court's proposed charge, subject to some exceptions not relevant for present

purposes, would be given based on the understanding reflected in the following excerpt from the trial transcript:

THE COURT: Any other requests to charge that were voiced [i.e. those pertaining primarily to Rule 144], as I understand it, have been withdrawn in the sense that they will not be included within the charge on consent. However, to the extent they involve some legal issue, or some issue that would affect the validity of the ultimate verdict, each attorney retains the right to assert that ground consistent with the law by way of post-verdict motions. So let me check with Mr. Rand. Is that an accurate statement?

MR. RAND: Yes, your Honor. This is an accurate statement.

THE COURT: All right. Mr. Kramer.

MR. KRAMER: An accurate statement except we wanted the jury to specifically be considering the volume of transactions at the time.

THE COURT: All right. I know you discussed this with [one of the Court's law clerks]. But that is not in the proposed – in the actual charge.

MR. KRAMER: This is our objection to the actual charge.

. . . .

THE COURT: That's reserved for a post-verdict motion.

MR. KRAMER: Yes.

THE COURT: Very good. All right so then we're ready for the jury.

MR. KRAMER: Yes, sir.

(Id. at 203-04.)

Presumably the above is the agreement referenced by defendant, albeit occurring at a different stage of the proceedings. Assuming that is so, the next question is whether that agreement is subject to Rule 50(b)'s 10 day provision.

As noted, defense counsel has identified the subject of the agreement as being "the Rule 144 issues reserved to the Court." (Def.'s Reply at 1.) In his view, "[t]he particular issues on 144 . . . are all legal issues not really appropriate for a jury."[6] (Tr. at 192.) In essence, the Court is currently being asked to grant defendant judgment as a matter of law on the ground that it, as the transfer agent for Panther Mountain Water Park, Inc., had a reasonable ground for refusing to record the stock sales made by Campbell in May of 1999 and that no reasonable jury could conclude to the contrary.

[6] The above statement by defense counsel regarding Rule 144 "legal issues" is inconsistent with the inaccurate statement in Liberty's July 8th letter that the understanding between the parties and the Court embraced both legal and factual issues.

That same ground was included in defendant's Rule 50(a) motion made at the conclusion of plaintiff's case-in-chief. But whereas the Court reserved decision on that Rule 50(a) motion, decision was not reserved under the charge conference agreement. Instead, the Court's and parties' understanding was that for grounds that "would affect the validity of the ultimate verdict," "each attorney retain[ed] the right to assert that ground consistent with the law by way of post-verdict motions." (Tr. at 204.) Post-verdict motions of the genre under discussions are governed by Rule 50.

Just as defendant was required under subdivision (b) of that Rule to move within 10 days of entry of judgment to preserve its arguments made at the conclusion of plaintiff's case-in-chief, it had to act within the same period with respect to the issues covered by the charge conference agreement as per the agreement's reference to post-verdict motions. Which is to say, this second of defendant's three "unresolved" issues, is also insufficient to render its Rule 50(b) motion timely.

8. Remaining Issue Referenced in Defendant's July 8, 2004 Letter

Relatively short shift may be made of this third, and final ground. Included within this ground are a series of "post trial issues regarding the verdict itself[,] whether or not it was contrary to the evidence . . . [and] whether or not

Plaintiff set forth a prima facie case on damages." (July 8, 2004 Letter from Edward J. Kramer, Esq. to Court at 1.)

As explained earlier, such issues may not be pursued unless, inter alia, the appropriate Rule 50(b) motion is made in a timely fashion. Otherwise, as is the case here, this Court lacks jurisdiction to entertain the relief sought.

CONCLUSION RE PART I

Judgment was entered on June 18, 2004. Rule 50(b)'s 10 day period had expired before defendant either filed the July 8th letter or its post-verdict motion for judgment as a matter of law unless the running of the period did not commence or was tolled. But nothing in defendant's motion papers, including its Reply Brief, or its July 8th letter, suggests no less establishes either to be the case. Under these circumstances, the Court is constrained to conclude that it is without jurisdiction to consider defendant's claims on the merits.

For the reasons indicated, defendant's Rule 50(b) post judgment motion is denied.

PART II – PLAINTIFF'S MOTION

Plaintiff has moved "for an Order, pursuant to, inter alia, Fed. R. Civ. P. 58, entering judgment, joint and severally, against Liberty Transfer Co. and against "Sara Sander" ["Sander"] its owner and sole proprietor, in the amount of $106,150.00 plus pre-judgment interest at the rate of 9% per annum commencing on

May 19, 1999 . . . ." (Pl.'s Sept. 1, 2004 Notice of Mot. at 1-2.)[7]

1. Request That Judgment be Entered Against Defendant Liberty and Non-Defendant Sander

The bases proffered by plaintiff for this item of relief is threefold: (1) defendant stipulated pretrial that Liberty "is [a] sole proprietorship," (Pl.'s Reply at 3 (referencing the Stipulated Facts portion of Joint Pre-Trial Order, at 4, ¶ 2)), (2) "Conger [, the manager of Liberty,] testified that . . . Sander was the owner and sole proprietor of . . . Liberty." (id. at 2), and (3) "the court's jurisdiction over a sole proprietorship also entitles the Court to personal jurisdiction over the owner of the sole proprietorship because the law does not recognize a sole proprietorship as a separate legal entity from its owner," (id.).

Defendant's response is as follows:

> At the onset of trial, the Court had reserved unto itself several issues of law and fact.

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[7] Judgment was entered on June 18, 2004. Plaintiff's initial motion to amend that judgment, made pursuant to Fed. R. Civ. P. 59, was filed on June 28, 2004. Accordingly, that motion, unlike defendant's Rule 50(b) application, was timely and may thus be addressed on the merits. See Fed. R. Civ. P. 6(a).

Plaintiff was required to refile that motion – which he did on September 1, 2004 – due to the Order of this Court dated August 12, 2004, which erroneously vacated the June 18, 2004 judgment and dismissed plaintiff's motion, without prejudice, as premature. That Order, as discussed in the text supra, exceeded the Court's jurisdiction.

> These issues were not presented to the jury for determination and, consequently, a determination on these matters was not incorporated into the verdict filed on July [sic; should read June] 18, 2004. As the Court has yet to render a decision on these matters, these issues have not yet been fully adjudicated. Therefore, Plaintiff's motion for entry of judgment at this juncture against Defendant and Sara Sander, who is not included as a defendant in the caption of this action, is premature.

(Def.'s Mem. Opp'n at 1-2.)

a) Entry of Judgment

For the same reasons articulated by the Court in Part I, defendant's renewed reliance on the concept of prematurity in the present context is rejected. Accordingly, plaintiff is entitled to have the judgment against Liberty re-entered.

b) Sander May Not Properly be Added as a Judgment Debtor

The caption in this case lists one plaintiff, Campbell, and one defendant, Liberty. That caption has remained unaltered through to the entry of judgment on June 16, 2004. In endeavoring to interject non-party Sander into the proceeding post-verdict, plaintiff correctly notes that "the owner of the full proprietorship is personally liable for the debts for the sole proprietorship," citing such cases as Latham Sparrowbush Assocs. v. Shaker Estate, 153 A.D.2d 788 (3d Dep't 1989); Yellow Book of NY L.P. v. Dimilia, 188 Misc.2d 489 (N.Y. Dist. Ct. Nassau County 2001); Williams v. Gleason, 1980 WL 102282 (Sup.

Ct. Albany County Aug. 13, 1979); and Vallejo v. Webb, No. 82 Civ. 4825, 1985 WL 234 (S.D.N.Y. Jan. 29, 1985). That the owner of the sole proprietorship may be called upon to answer for its debts does not eliminate the need for the purported owner[8] to be served with Notice and provided with an opportunity to be heard before being directed by a court to make payment. Significantly, but not surprisingly, reference to each of the cases cited by the plaintiff indicates that the individual implicitly said to be Sander's counterpart for jurisdictional purposes was a named defendant in the action, unlike Sander. Simply put, this Court lacks in personam jurisdiction over Sander.

In sum, plaintiff's application to have Sander listed as a judgment debtor is denied.

2. Plaintiff's Request for Prejudgment Interest at the Rate of 9% Per Annum Commencing on May 19, 1999

The parties are in federal court based on diversity jurisdiction. (First Amended Compl. ¶ 3.) "Since federal jurisdiction in this case is premised on diversity and the right to interest on a cause of action qualifies as a substantive

[8] For the proposition that Sander was the owner of Liberty during the time plaintiff's causes of action accrued, plaintiff cites the testimony of Conger. Conger testified that she "run[s] the business for the owners" and then identified the owner as "Sara Sander." (Tr. 42-43.) She was not asked, and accordingly did not indicate, whether Sander was the owner during the period relevant to plaintiff's claims, as distinct from being the owner as of the time the witnesses testified, to wit in June of 2004.

right, we must look to New York law." Adams v. Lindblad Travel, Inc., 730 F.2d 89, 93 (2d Cir. 1984). In keeping with that directive, plaintiff cites N.Y. CPLR 5001 and 5004 in seeking interest as per New York law.

CPLR 5001 provides in pertinent part:

> (a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property. . . .
>
> (b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.
>
> (c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

CPLR 5004 indicates that "[i]nterest shall be at the rate of nine per centum per annum, except where otherwise provided by statute."

In response to plaintiff's application for prejudgment interest, defendant contends that "plaintiff has not offered any explanation for its arbitrary designation of nine percent (9%) as the prejudgment interest rate," (Def.'s Mem. Opp'n at 3), seemingly choosing to ignore opposing counsel's short, but certainly understandable argument on the interest issue. (See Pl.'s Mem. Supp. at 3, including the reference to Oy Saimaa Lines Logistics, Ltd. v. Mozaica-New York, Inc, 193 F.R.D. 87 (E.D.N.Y. 2000).) Beyond that, however, defendant has not addressed plaintiff's position that New York substantive law applies, and that New York would apply its own law, including CPLR 5001 and 5004, in determining the plaintiff's entitlement to prejudgment interest.

Instead, defendant cites a series of federal cases in which federal law, including 18 U.S.C. § 1961, was applied in determining whether prejudgment interest should be awarded and, if so, in what amount. No effort is made, however, to explain why one or more of those cases provide a governing standard for present purposes. And no reason is apparent to the Court given that none of the cited cases — unlike those relied upon by plaintiff — are predicated on diversity jurisdiction.

Having reflected on the respective arguments of counsel, the Court concludes that §§ 5001 and 5004 are applicable to plaintiff's request for prejudgment interest. CPLR 5001(a)

provides that prejudgment interest "shall" be awarded for a qualifying cause of action. Plaintiff recovered on three causes of action, one of which, conversion, clearly may be legitimately so characterized. See Eighteen Holding Corp. v. Drizin, 268 A.D.2d 371 (1st Dep't 2000)(awarding prejudgment interest on conversion claim). CPLR 5004 sets the rate of interest at 9% per annum.

The jury was not asked to determine the starting date for the running of interest. As a result, the obligation "to fix the date" rests with the Court. CPLR 5001(c). Plaintiff has requested the date of May 19, 2004, that being the claimed date plaintiff "was first improperly prohibited from transferring his shares."[7] (Pl.'s Mem. Supp. at 4.) Defendant has remained silent on the subject.

In finding for plaintiff on his conversion claim, the jury necessarily found that defendant wrongfully affixed a restrictive legend on plaintiff's stock certificate and refused to record the transfer of shares sold by plaintiff. Both of those events apparently occurred on May 25, 1999. (See Trial Ex. B (Uniform Rejection Notice dated May 25, 1999, referring to a "Stop on Certificate # 6115 [i.e., plaintiff's share certificate;

[7] Reference to Trial Exhibit C, cited by plaintiff, does not support the proposition that defendant refused on May 19, 2004 to record a stock transfer reflecting a sale made by plaintiff.

see Trial Ex. A]" as representing "Restricted Shares"); see also Tr. at 89-90.) Therefore, it seems that the first refusal by defendant occurred on May 25th, not May 19th.

As "the earliest ascertainable date the cause of action existed," May 25, 1999 is the appropriate date for the commencement of interest to the extent that damages were incurred on that date. However, the amount of damages incurred as of May 25th cannot be gleaned from the record. To place the problem in context, some additional background information is required.

Plaintiff intended to market his entire interest in Panther Mountain Water Park, consisting of 575,000 shares, "over the period of a couple months." (Tr. at 60.) Pursuant to that plan, plaintiff testified he sold "155,000 shares from . . . May 18th to June 2nd." (Id. at 59.) We know from Trial Exhibit B that defendant refused on May 25, 1999 to transfer some unspecified number of those 155,000 shares. That the refusal did not pertain to all of the shares is implicit in plaintiff's testimony that the initial sales period extended to June 2nd. Rather than engage in guesswork in an effort to determine how many of the 155,000 shares defendant refused to acknowledge for transfer purposes on May 25, 1999, the procedure, explained infra, will be used to select "a reasonable intermediate date" (CPLR 5001(b)) which will be the commencement date for the computation of interest.

Defendant sold slightly in excess of 25% of his 575,000 shares between May 18th and June 2, 1999, i.e., 15 days. If he sold his remaining shares at the same rate, his entire holding would have been liquidated, and the concomitant "damages incurred" by about July 17, 1999 which, incidently, dovetails time-wise with plaintiff's marketing plan. CPLR 5001(b). The Court concludes that a reasonable intermediate date between May 18th and July 17 1999 is June 17, 1999. Accordingly, that will be the date from which interest will be computed.

In sum, plaintiff is awarded prejudgment interest at 9% measured from June 15, 1999 up to the date that both the verdict was returned and the judgment initially entered, to wit, June 18, 2004. See CPLR 5001(c) ("The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered . . . .").

CONCLUSION RE PART II

Plaintiff's motion to, in effect, re-enter the judgment of June 18, 2004 is granted; his motion to have Sander listed as a judgment debtor in that judgment is denied; his application to add prejudgment interest at the rate of 9% per annum is granted but with the starting date being June 17, 1999, not May 19, 1999 as requested. The Clerk of the Court is hereby directed to enter judgment in favor of plaintiff against defendant in the amount of $106,150.00 plus interest from June 17, 1999 to June 18, 2004,

the date the verdict was rendered. Upon entry of judgment, the Clerk of the Court is directed to close the case.

The above constitutes the decision and order of the Court.

SO ORDERED.

Dated: August 19, 2005
Central Islip, New York

/S/
DENIS R. HURLEY, U.S.D.J.